The role of non-state actors in treaty regimes for the protection of marine biodiversity

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Introduction

Recent discoveries of the richness of life around deep ocean hydrothermal vents vividly highlight the relative lack of understanding of the resources of the oceans and of the impacts of human activity on them. To this must be coupled the rapid rate of expansion of activities and consequent threats to marine biodiversity in general. These discoveries raise hard questions about how best to manage and conserve biodiversity in the oceans. As these questions arise, so do questions about who has authority to make decisions about the future of the myriad of species that combine to make up that biodiversity. Will legal regimes be effective if established by States alone or is there a need for other actors to be engaged in decision-making or in the development of the regimes? If there is a need, then what should the nature of that involvement be?[1]

Most regimes aimed at protecting marine biodiversity demonstrate a willingness to engage with non-State actors in the development or implementation of the regimes. Indeed in international law more generally, non-State actors have been involved in the development and implementation

*With thanks to the secretariats of the regional seas organisations for their help in tracking down various rules of procedure and to the editors for their helpful comments on earlier drafts. All errors remain the author's alone.

[1] This chapter focuses on participation at the international (global or regional) level.

of the law for a considerable length of time.[2] Their role has gone through various stages with their influence ebbing and flowing across the decades. More recently the perception has been both that the influence of non-State actors, and NGOs in particular, has increased and that their role ought to be enhanced. This chapter examines the provision for non-State actor involvement in the legal regimes concerned with the conservation of marine biodiversity. Non-state actors do of course engage with decision-making processes in other less formal ways, lobbying States being one example. While the importance of such activities is acknowledged, this chapter focuses solely on formal engagement with non-State actors.

The chapter begins with a brief review of some of the theoretical underpinnings for the involvement of non-State actors, before moving on to review the provision made for their engagement in the regimes addressing the protection or management of marine biodiversity. Consideration is given to the justifications given for having participatory processes, the form that participation takes (focussing on participation within treaty and relevant soft law regimes), and the fit between form and any stated objectives of participation. It also considers the impact that the chosen form may have on the levels and types of participation, and ultimately the impact participation may have on the quality or legitimacy of the decisions taken. The objective is to provide a taxonomy of participation within the regimes that are focussed upon the protection of marine biodiversity.

Engaging With Non-State Actors: Justifications and Limitations

[2] Steve Charnovitz, 'Two centuries of participation: NGOs and international governance ' (1997) 18 Michigan Journal of International Law 183.

There are a variety of reasons for engaging non-State actors in decision-making. Although it may not be possible to point to a binding norm in international law requiring participatory rights for non-State actors,[3] it is possible that such a right is emerging or will emerge in the future.[4] In the meantime there are other practical reasons for providing such rights. For example, there is a substantial body of literature predicated upon the argument that the effectiveness of international regimes rests upon their legitimacy.[5] While there are a number of possible routes to legitimacy, such as the constructivist route expounded by Brunée and Toope, one route that has gained considerable support is to ensure that regimes are based upon deliberative democratic processes that engage with non-State actors.[6] The latter route is followed in this chapter. The next few paragraphs provide a brief introduction to the relationship between engagement with non-State

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[3] Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 57; Anne Peters, 'Membership in the Global Constitutional Community' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (p.153, 2009) 22; Attila Tanzi, 'Controversial Developments in the Field of Public Participation in the International Environmental Law Process' in Pierre-Marie Dupuy and Louisa Vierucci (eds), *NGOs in International Law: Efficiency in Flexibility?* (Chapter 4 pp 135-152, Edward Elgar 2008).

[4] Peters *ibid*; Steve Charnovitz, 'The Illegitimacy of Preventing NGO Participation, The Symposium: Governing Civil Society: NGO Accountability, Legitimacy and Influence' (2010-2011) 36 Brook J Int'l L 891, 898.

[5] See for a summary, Daniel Bodansky, 'Legitimacy' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007). See also Steven Bernstein, 'Legitimacy in Global Environmental Governance' (2004-2005) 1 J Int'l L & Int'l Rel 139; Jutta Brunnée and Stephen J. Toope, 'International Law and Constructivism: Elements of An Interactional Theory of International Law' 39 Columbia Journal of Transnational Law 1; Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law* (Cambridge University Press 2010); Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford University Press 1990).

[6] See, for example, Allen Buchanan and Robert O. Keohane "The Legitimacy of Global Governance Institutions" (2006) 20 Ethics and International Affairs 405; Jonas Ebbesson, 'Public Participation' in Bodansky, Brunnée and Hey n5. See also, Thomas M. Franck, *Remarks, in "*Non-State Actors As New Subjects Of International Law", 151, 152 (Rainer Hofmann ed. 1998); *Report of the Panel of Eminent Persons on United Nations-Civil Society Relations, 37,* 46, UN Doc. A/58/817, (June 11, 2004).

actors and legitimacy and that relationship is returned to throughout the chapter.

Where once theory and practice may have led one to conclude that the requirement for deliberative democracy may be satisfied by ensuring that any and all interested States have an opportunity to participate, that no longer appears to be sufficient and practice across many areas of international law now demonstrates engagement with non-State actors.[7] Such practice has led to a positive demonstration that engagement with NGOs (and other non-State actors) can make a substantial contribution to improving the legitimacy of decision-making within international regimes.[8] This may be as a result of simple engagement with non-State actors, or because engagement allows those actors to highlight poor decisions[9] thus leading to better quality decision-making. They may also improve the quality of decision-making through their relative freedom to champion certain developments, which States may lack the freedom to do.[10]

Equally, the failure to include non-State actors directly in the decision-making process does not preclude their influence on decisions through lobbying activities,[11] but the perception of undue influence that may arise as a result of such action could undermine the perceived legitimacy of an organisation or regime. Thus there may be a need to provide input to decision-making by

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[7] See, for example, Pierre-Marie Dupuy and Luisa Vierucci (eds), *NGOs in International Law: Efficiency in Flexibility?* (Edward Elgar 2008); Charnovitz n. 2; Steve Charnovitz, 'Nongovernmental Organizations and International Law' (2006) 100 American Journal of International Law 348.

[8] See, for example, Rahim Moloo, 'The Quest for Legitimacy in the United Nations: A Role for NGOs?' (2011) 16 UCLA Journal of International Law and Foreign Affairs 1, who provides an excellent critique of some of this literature.

[9] Kal Raustiala, 'The "Participatory Revolution" in International Environmental Law' (1997) 21 Harvard Environmental Law Review 537, 553.

[10] Charnovitz n.7.

[11] See, for example, Elizabeth A. Kirk, 'Marine Governance, Adaptation and Legitimacy' (2011) 22 Yearbook of International Environmental Law 110.

non-State actors through formal transparent participatory processes, which may be viewed as more legitimate.

The substantial body of general literature that explains why participatory decision-making is beneficial also supports the international law literature promoting the use of participatory processes.[12] The arguments presented in the general literature include that participatory processes enhance problem-solving abilities and provide access to additional information and perspectives not otherwise available to decision-makers. A further argument is based on the acknowledgement that science and the technocracy can never have the capacity to provide absolute certainty of result, which leads to the conclusion that uncertainty is a normal part of scientific understanding. Thus, if society is to make decisions on the basis of what is acknowledged to be uncertain information, then participatory processes are necessary to ensure that the resulting decisions maintain legitimacy. Without deliberative democracy the decisions risk (in the context of uncertainty) becoming obviously based upon the preferences or prejudices of the bureaucrats or political elite that make them.

There are however, certain counter arguments to the involvement of non-State actors in decision-making processes. Central to these is the positivist argument that the only recognised subjects of international law with the

[12] See, for example, Marie Appelstrand, *Participation and Societal Values: The Challenge for Lawmakers and Policy Practitioners* (2002) 4 Forest Policy and Economics 281; Julia Black, *Proceduralizing Regulation: Part I* (2000) 20 OJLS 597-614; John Dryzek, The Politics of the Earth: Environmental Discourses (Oxford University Press, 2005); Daniel J. Fiorino, *Citizen Participation and Environmental Risk - A Survey of Institutional Mechanisms* (1990) 15 Science Technology & Human Values 226; Kate Getliffe, *Proceduralisation and the Aarhus Convention: Does Increased Participation in the Decision-making Process Lead to More Effective EU Environmental Law?* (2002) 4 ELR 101; Maria Lee and Carolyn Abbot, *The Usual Suspects? Public Participation under the Aarhus Convention* (2003) 66 MLR 80; Jenny Steele, *Participation and Deliberation in Environmental Law: Exploring a Problem-Solving Approach* (2001) 21 OJLS 415.

capacity to make international law are States.[13] The argument is that non-State actors, and NGOs in particular, are not recognised as full subjects of international law. They therefore do not have capacity to engage in law-making activities as such activities are, under the positivist rule of recognition, reserved for subjects with full international legal capacity i.e. States. This argument, of course, ignores the fact that international law does now recognise the various forms or degrees of personality granted to non-State actors.[14]

Further arguments have been developed with regard to the inclusion of NGOs, in particular, in international decision-making. One is that NGOs representing a particular narrow interest group or section of global society may change the power balance in an international organisation. If, for example, the result of their involvement is to marginalise developing States, the efficacy of engaging with NGOs may be questioned.[15] In addition, some have argued that allowing non-State actors, and NGOs in particular, a seat at the decision-making table, allows certain groups to have "two bites at the cherry". One bite occurs at the national level through lobbying of national governments and then a second at the international level. This might be particularly problematic if only certain sections of society have representation

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[13] Pierre-Marie Dupuy, 'Conclusions: Return on the Legal Status of NGOs and on the Methodological Problems Which Arise For Legal Scholarship' in Dupuy and Vierucci (n.7) pp204-215.

[14] Thus for example, private individuals are granted rights under human rights regimes, including procedural rights that enable them to hold States to account for breaches of certain obligations. Individuals may also be prosecuted for international crimes. Inter-governmental organisations have likewise been recognised as having such personality as they require to carry out their functions. While these developments in the law may leave the question of the rights and obligations of NGOs under international law unanswered, they suggest that the argument that only States should be involved in decision-making, as only they have personality in international law, is now rather dated.

[15] Sergey Ripinsky and Peter Van Den Bossche, *NGO Involvement in International Organizations: A Legal Analysis* (British Institute of International and Comparative Law 2007).

at the international level.[16] A further argument for the exclusion of NGOs in particular is that they may lack "legitimacy, meaning they are neither accountable to an electorate nor representative in a general way."[17]

These arguments give cause to consider carefully the nature of participatory rights and the reasons for granting any such rights at the international level. If the object of participation is to ensure that any decisions best reflect society's preferences, then the criticisms weighed against NGO involvement are significant. To ensure that the decision-making processes maintain legitimacy in this context it would be necessary to design participatory rights in a manner that facilitated representation by a broad cross-section of society. If, by contrast, the objective is to improve decision-making through improving the quality of information available within a particular regime, then questions of representativeness or of marginalisation become less significant. What would be significant in this context is whether those involved in deliberations have access to, or bring with them, key information necessary for an informed decision.

These arguments give rise to further questions: what do we mean by participation and should participatory rights take a particular form?

The Meaning of Participation

In both theory and practice, there are a number of possible answers to the question of what participation involves. Arnstein first categorised the possibilities in her ladder of participation, and the possibilities have been expanded upon since then. Arnstein's categories are based upon the degree

[16] See Charnovitz n.7; John R. Bolton, *Should We Take Global Governance Seriously?* (2000) 1 CHI. J. INT'L L. 205, 217.
[17] Ripinsky and Van Den Bossche (n.15) at 12.

to which decision-making involves the public.[18] At the bottom of the ladder are processes which inform the public that the decision has been made, above these in terms of opportunity to participate sit processes involving consultation (where the public respond to questions or information given by the decision-maker, but have no role in making the final decision), to co-decision-making (partnership) and finally, to fully delegated decision-making. Each level may, in practice, take a number of forms, such as: hearings, focus groups, (internet) forums, roundtables, citizen forums, multiple stakeholder conferences, consensus-oriented meetings and multiple discussion circles.[19]

One of the challenges in participatory decision-making is in determining the appropriate form and level of participation and appropriate limitations on engagement. Thus consideration has to be given to questions such as which actors should be given a right to participate, how they should be informed of such rights and what assistance if any should be provided to enable them to participate. These questions are in addition to the initial question of what level of participation should be granted. It could be argued that any limitation on participatory rights is inappropriate, that deliberative democracy demands that all should be free to participate fully in decision-making. While it is possible to construct endless arguments as to the theoretical appropriateness of the breadth or depth of participation, pragmatism requires that consideration be given to both the workability of any scheme and State responses to participatory rights. A completely open forum would make

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[18] Sherry R. Arnstein, 'A Ladder of Citizenship Participation' (1969) 26 Journal of American Institute of Planners 216. See also, for example, Organisation for Economic Co-operation and Development, *Stakeholder Involvement Techniques: Short Guide and Annotated Bibliography, A Report from Nuclear Energy Agency Forum for Stakeholder Confidence 5* (http://wwwoecd-neaorg/rwm/reports/2004/nea5418-stakeholderpdf, 2004) accessed September 2013.

[19] Ortwin Renn and Pia-Johanna Schweizer, 'Inclusive Risk Governance: Concepts and Application to Environmental Policy Making' (2009) 19 Environmental Policy and Governance 174.

international decision-making unworkable and thus participation must be limited in some way.

Participation may also need to be limited to help ensure the continuing participation of States within a regime. There is a danger that too broad a forum may undermine State perceptions of the legitimacy of a regime, particularly if they view some of the participants as having more influence than their interest in an issue is thought to warrant. A relatively simple example of this is provided by the debates surrounding the legitimacy of the International Whaling Commission. While the rights of non-State actors to participate directly within the regime are quite limited,[20] their role in ensuring change within the IWC has led some States to question the legitimacy of the regime.[21] For example, from the 1970s onwards NGOs lobbied States inside and outside of the IWC [22] and in other fora[23] presenting what some have identified as propaganda[24] in (the ultimately successful) pursuit of a whaling

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[20] See IWC Rules of Procedure and Financial Regulations As amended by the Commission at the 64thAnnual Meeting, July 2012 <http://iwc.int/private/downloads/4q1f826otzmsccco4k000sg0c/Rules%20of%20Procedure%20Dec%202012.pdf> see in particular Rule C and E.

[21] Kirk n.11; Patricia Birnie, 'Role of Developing Countries in Nudging the International Whaling Commission from Regulating Whaling to Encouraging Nonconsumptive Uses of Whales, The' (1984) 12 Ecology Law Quarterly 937; Kieran Mulvaney, 'The International Whaling Commission and the Role of Non-Governmental Organizations' (1996-1997) 9 Georgetown International Environmental Law Review 347; Peter J Stoett, 'Of Whales and People: Normative Theory, Sybmolism and the IWC' (2005) 8 Journal of International Wildlife Law and Policy; Diana Wagner, 'Competing Cultural Interests in the Whaling Debate: An Exception to the Universality of the Right to Culture Symposium: Whither Goes Cuba: Prospects for Economic & Social Development: Part II of II: Student Notes' (2004) 14 Transnat'l L & Contemp Probs 831.

[22] Mulvaney ibid; Birnie ibid 954-955.

[23] UN Conference on the Human Environment Action Plan for the Human Environment Recommendation 33 See *Report of the United Nations Conference on the Human Environment* <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97>. See also Steiner Andresen and Tora Skodvin 'Non-State Influence in the International Whaling Commission, 1970 to 2006' in Michele M. Betsill and Elisabeth Corell (eds.) *NGO Diplomacy: The Influence of Nongovernmental Organizations in International Environmental Negotiations* (The MIT Press, 2008), 127.

[24] Stoett n.21 160-165.

moratorium. As a result of the adoption of the moratorium certain States left the IWC objecting to the decision and decision-making process (though some of those returned at a later date.)

It is clear, then, that there is no simple or singular approach to defining participation or the appropriate level of participation for international regimes, and that any answer constructed on a theoretical basis may be of little utility in guiding the practice of international law. Participatory processes, if they are to enhance the effectiveness or legitimacy of regimes, will require to be designed to fit the needs of the particular regime. In the following sections, consideration is given to the stated objectives for providing participatory processes within regimes addressing marine biodiversity, with a view to establishing what the needs of these regimes actually are. Attention is then turned to the form in which participatory rights are granted. The analysis that follows thereafter draws out the impact of form on the ability of the participatory processes to meet the regimes' objectives *vis à vis* participation and their impact on the legitimacy of the regimes.

Objectives for Participatory Processes

None of the treaties examined here contain an express statement as to the purpose of participatory processes. A few do, however, imply that the objective is to improve the implementation of the treaty in question. Within the biodiversity regime, for example, the primary function of participatory processes appears to be to ensure the effective implementation of its obligations. This aim is evident in the preamble to the Biodiversity Convention[25] where the Parties "[stress] the importance of" NGOs in

[25] Convention on Biological Diversity 1992 (1992) 31 ILM 818.

conservation. In addition the preamble also contains reference to the role of indigenous peoples and women in preserving biodiversity. The relative importance of indigenous peoples and their knowledge in biodiversity protection is highlighted again by Article 8 which, in addressing *in situ* conservation, refers to the need to respect, preserve etc. indigenous and local knowledge and practices. Similarly, Article 10 refers to the protection of customary uses and local knowledge in ensuring sustainable use of the components of biodiversity.

While neither of these articles actually provide for civil society involvement in decision-making, what they do is highlight the reasons such participation may be needed. They highlight that in particular it is participation from indigenous groups within society that is thought to be particularly important, with participation from NGOs more generally following behind this. The motivation for such involvement may be either to improve the quality of information available in the decision-making process, or to improve the perceived legitimacy of the regime amongst certain sections of society with a view to enhancing their compliance with the regime or their involvement in decision-making relating to implementation. The former at first sight seems more credible since the lack of attention to other groups, such as industry, and the focus on particular sections of society, indicates that achieving legitimacy through deliberative democracy was not a concern of the Parties to the regime. It is, however, worth considering the fact that industry may be represented through NGOs and so while not mentioned by name its representation is not precluded by these provisions. Secondly, it may also be that a decision was taken to prioritize rights for indigenous peoples and NGOs generally to redress the fact that business interests are more likely to be taken into account in decision making because of the historically greater access to governments that business has had compared to other sections of

society. Thus, while it appears more likely that the focus of the biodiversity regime is on improved information rather than delivering deliberative democracy, a clear conclusion on this point is not entirely possible.

Other regimes appear to aim to improve the performance of the regime through drawing on non-State actors to increase the capacity and expertise of those tasked with implementation of the regime. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[26] provides that intergovernmental and non-governmental agencies may be called upon to assist the Executive Director of UNEP in providing a secretariat for CITES (Article XII). Something similar exists under Ramsar[27] where the IUCN provides the Bureau or Secretariat to the Convention under Article 8 and also under the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR).[28] The CCAMLR points to the involvement of non-State actors in the development of the regime as well as in its implementation. Under Article XXIII the Commission and Scientific Committee are to "seek to develop co-operative working relationships, as appropriate, with inter-governmental and nongovernmental organisations which could contribute to their work". And where cooperative arrangements are entered into the Commission may invite the organisations to send observers to its meetings. Similarly the 2003 African Convention on the Conservation of Nature and Natural Resources provides that the Secretariat may seek the co-operation of various bodies, including non-governmental organisations, to aid with implementation.[29] While this focus on improving

[26] Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 993 UNTS 243.
[27] Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971 996 UNTS 245.
[28] Convention on the Conservation of Antarctic Marine Living Resources 1980 (1982) 1329 U.N.T.S. 47
[29] <http://www.au.int/en/sites/default/files/AFRICAN_CONVENTION_CONSERVATION_NATURE_NATURAL_RESOURCES.pdf> Article 28.

the quality of decision-making may in turn improve the legitimacy of the regime, legitimacy derived from deliberative democracy again does not appear to be a concern of the Parties.

In the context of marine biodiversity conservation, the Biodiversity Convention, CITES, CCAMLR and the Ramsar Convention are rather unusual in their provisions regarding non-State actors. The other relevant regimes in this context are the regional seas regimes and few of these make the role of non-State actors so explicit in their founding treaties. Even those that do address the role of non-State actors tend to focus on the provision of information to them and education of them. For example, the Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region[30] (Nairobi Convention) encourages the Parties to take part in activities designed to provide information to the public and public education (Article 15). Similarly the Framework Convention for the Protection of the Marine Environment of the Caspian Sea[31] provides in Article 20 (2) that:

> The Contracting Parties shall endeavour to ensure public access to environmental conditions of the Caspian Sea, measures taken or planned to be taken to prevent, control and reduce pollution of the Caspian Sea … taking into account provisions of existing international agreements concerning public access to environmental information.

Similar provisions are found elsewhere, such as in Article 17 of the 1992

[30] Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, Nairobi, 1985 (Nairobi Convention).
[31] Framework Convention for the Protection of the Marine Environment of the Caspian Sea, Tehran, 2003 (Tehran Convention).

Convention on the Protection of the Marine Environment of the Baltic Sea Area.[32] Other Conventions and Protocols that appear at first sight to instigate a proactive approach are, on closer inspection, found to contain rather weak provisions. For example, the Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region[33] to the Nairobi Convention makes mention in Article 12 of the need to take account of traditional activities in areas that are to become protected areas. However, there is no reference to involvement of the indigenous peoples in the establishment or management of the areas. It is, therefore, quite conceivable that information could be gathered on traditional activities, and that information factored into decision-making without any involvement of those living within the area.

This focus on the provision of information suggests that the majority of regimes addressing marine biodiversity aim to provide participatory rights at the lower end of Arnstein's ladder. In addition, the regional seas regimes appear to mirror the Biodiversity regime in making scant, if any, direct reference to business. Their focus is instead on engaging members of the public in general and, in some regions, indigenous peoples. Only in the Mediterranean is there an apparent reference to business, where it calls upon NGOs to engage with the private sector, which one may assume includes business.

It also appears that some of the regimes, such as the Caspian and Baltic regime, have engaged in the provision of information to improve the transparency of decision-making and so enhance the legitimacy of the regime in that way. Others, such as the Eastern African regime, may aim to improve the quality of decision-making in relation to implementation, but the

[32] Convention on the protection of the marine environment of the Baltic Sea, Helsinki 1992, (2002) 2099 U.N.T.S 195 (Helsinki Convention).
[33] Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region, Nairobi, 1985.

commitment to doing so is rather limited.

In general, then, the conclusion to be drawn on the objectives of participatory rights, as stated or implied from the founding documents of these regimes, is that they are included to improve the quality of decision-making and the quality of implementation of decisions within regimes. Whilst this may ultimately help improve the legitimacy of each of the regimes, there appears to be little desire amongst the Parties to use participatory processes as a means to improve the regimes' democratic legitimacy. In this context, the competing arguments of writers such as Anderson[34] and Charnovitz'[35] as to the appropriateness or otherwise of giving non-State actors full participatory rights, become less important. And, while the apparently limited approach to participatory rights may serve to disappoint some sections of society, it appears to accord with the general approach in international law as expressed in the Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums. Although these guidelines call for participation to be as broad as possible[36] they also recognise, in paragraph 31, the need for participation to be restricted at times. Practice elsewhere also shows a similarly limited approach to participatory rights. Bettin,[37] for example, notes the limited role generally granted to NGOs in relation to development policy. In the field of marine biodiversity, there is, however, one notable exception to the general rule that participation is limited: the Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment

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[34] Kenneth Anderson, 'Accountability as Legitimacy Global Governance, Global Civil Society and the United Nations' (2011) 36 Brook J Int'l L 841 at 844.
[35] Charnovitz n.7.
[36] Almaty Guidelines Aarhus Convention MOP 2 (2005) DECISION II/4 Promoting the Application of the Principles of the Aarhus Convention in International Forums paragraph 30.
[37] Valentina Bettin, 'NGOs and the Development Policy of the European Union' in Dupuy and Vierucci (n.7) pp 116-134.

of the Wider Caribbean Region[38] which requires Parties to develop public awareness programmes and to involve the public "in the planning and management of protected areas" (Article 6).[39] As a counter to this exception it is also worth noting that there are some biodiversity regimes that make no express provision for participation by non-State actors, such as the Bonn Convention Memorandum of Understanding Between the Argentine Republic and the Republic of Chile on the Conservation of the Ruddy-Headed Goose[40] and the Bonn Convention Wadden Sea Seal Agreement.[41]

To base conclusions on the participatory nature of the regional seas regimes on the treaty provisions alone would, however, be misleading. More progressive approaches are frequently found in the soft law attached to these regimes. Many of the regional seas regimes have provisions on participation within Programmes or Plans of Action or within recommendations or decisions and some address the participation of non-State parties through Rules of Procedure. Nevertheless, although more progressive than the treaty provisions, they could not be described as providing leading examples of participatory processes. The provisions instead tend to focus on capacity building and improving implementation rather than improving the quality of normative decisions.

The most progressive of the regimes include partnership agreements between the States Parties and civil society organizations. Generally these agreements provide for identified projects to be carried out either by non-State actors alone or in consortia of States and non-State actors. For example, the Parties to

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[38] Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Kingston, 1990, (2004) 2180 U.N.T.S. 101 (SPAW Protocol).
[39] [we are likely to cross-refer to an earlier chapter in the Handbook at this point]
[40] <http://www.cms.int/ruddy-headed-goose/en/documents/agreement-text>.
[41] For further information see <http://www.waddensea-secretariat.org/management/seal-management>.

the Nairobi Convention have entered into memoranda of understanding with regional and global NGOs such as WWF, the International Union for the Conservation of Nature (IUCN), the Western Indian Ocean Marine Science Association (WIOMSA), BirdLife International and the Wildlife Conservation Society (WCS). The Parties to the Barcelona Convention have similarly made provision for the establishment of a partnership agreement within the Mediterranean Action Plan. The Plan draws a range of intergovernmental organisations and NGOs into the implementation process.

There are also examples of fuller cooperation between States and non-State actors. The East Asia Seas Action plan, for example, is administered by the Coordinating Body for the Seas of East Asia (COBSEA) which had as its original objective to bring together interested States and to create:

> an environment, at the regional level, in which collaboration and partnership (between all stakeholders and at all levels) in addressing the environmental problems of the South China Sea is fostered and encouraged and to enhance the capacity of the participating governments to integrate environmental considerations into national development planning.[42]

The South Asia Co-operative Environmental Programme (SASCEP) goes further still in that not only does its Action Plan provide for cooperation with NGOs, but it is reliant on funding from external actors including NGOs. There are, in addition, some organisations that set out to engage more fully in multi-stakeholder governance. For example, the Coral Triangle Initiative was established through the work of a consortium of States and NGOs and in its action plan repeatedly refers to working groups being established which encompass NGO representatives as well as other actors.[43]

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[42] New Strategic Direction for COBSEA 2008-2012, 3.
[43] Coral Triangle Initiative "Regional Plan of Action" 2009.

In respect of all of these regimes the aim of involving non-State actors appears to be focused entirely on enhancing the quality of implementation. Few of the arrangements are designed to create equal partnerships between States and non-State actors. In some instances it might be more accurate to describe the non-State actors as carrying out tenders for projects, rather than as partners. Nevertheless these arrangements are likely to improve implementation and better implementation may ultimately improve the legitimacy of the regime, but that does not appear to be the primary objective of participatory decision-making in these regimes.

The same may be said of other regions, which, whilst not containing such progressive features, do note the importance of engaging with non-State actors to ensure that the provisions of their treaties and programmes of action are implemented effectively.[44] For some, such as the Baltic, this acknowledgement leads to calls to the State Parties to ensure engagement with civil society during implementation.

While the objectives of participatory processes may set the tone for engagement with non-State actors, the nature of the rights granted is frequently dictated by rules on participation. There are broadly two aspects to the granting of participatory rights in regimes addressing marine biodiversity: the adoption of threshold requirements for entities seeking participatory rights and the level or degree of participation granted to such entities. These aspects are now addressed in turn.

Rules on Participation

Threshold requirements for the granting of participatory rights

[44] See for example, HELCOM Recommendation 28E/9 "Development of Broad-Scale Marine Spatial Planning Principles in the Baltic Sea Area.

Many of the regimes considered in this chapter take a 'restrictionist'[45] approach to the engagement of non-State actors. For example, under Article 23(5) of the Biodiversity Convention and Article XI of CITES, any governmental or non-governmental body can apply for observer status provided that they meet certain requirements for qualification. In the Biodiversity regime the requirement is that they be "qualified in fields relating to conservation and sustainable use of biological diversity".[46] In CITES it is that they be "qualified in protection, conservation or management of wild fauna and flora".[47] No definition or explanation of the word "qualified" is given in either regime. Further detail is provided within the Rules of Procedure for both conventions, though in neither case does this address what it means to be qualified in the particular field. What they do provide is a rule (Rule 7 CBD and Rule 2 CITES) that observer status will be granted to applicants unless at least one third of the Parties object. By contrast the Whaling Convention Rules of Procedure simply provide that non-party States and intergovernmental organisations may become observers and that "[a]ny non-governmental organisation which *expresses an interest* in matters covered by the Convention, may be accredited as an observer" (emphasis added).[48] Whilst proving an interest in a matter should be easier than proving that an entity is qualified in a particular area, both types of provision leave considerable discretion to the Parties. Such discretion may appear unproblematic where the objective of participatory processes is to improve the quality of information feeding into decision-making, but it relies on the Parties being fully aware of gaps in the information they have. Yet research

[45] Ripinsky and Van Den Bossche n.15, 15.
[46] Biodiversity Convention Article 23(5).
[47] CITES Article XI (7).
[48] IWC Rules of Procedure and Financial Regulations As amended by the Commission at the 64th Annual Meeting, July 2012, Rule C(1)(b).

has shown that, on occasion, regulators unconsciously place more emphasis on some types of information than on others.[49] They may equally be likely to invite certain types of organisations rather than others.[50] Moreover, if the objective of the participatory processes were to be to help improve the legitimacy of decision-making then the existence of such wide discretionary powers would be problematic as it may be used to block participation by otherwise qualified participants.

Despite these potential problems, the same types of provisions as found in the CBD apply under other conventions, such as under Article VII of the Bonn Convention[51] and the Barcelona Convention for the Mediterranean[52] though the latter requires that two thirds of the Parties positively approve the invitation, rather than simply providing that unless one third object the invitation will stand. The Bonn Convention also has a series of subsidiary agreements and memoranda of understanding, which contain some interesting variations on these participatory rights. While most contain similar provisions – providing for participatory rights for suitably qualified organisations – some, such as the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS)[53] and the Agreement on the Conservation of Small Cetaceans

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[49] See, for example, H. Valve and J. Kauppila, 'Enhancing Closure in the Environmental Control of Genetically Modified Organisms' (2008) 20 Journal of Environmental Law 39; M. Kritikos, 'Traditional Risk Analysis and Releases of GMOs into the European Union: Space for Non-Scientific Factors?' (2009) 34 European Law Review 40; B. Hedelin and M. Lindh, 'Implementing the EU Water Framework Directive - Prospects for Sustainable Water Planning in Sweden' (2008) 18 European Environment 327.

[50] See, in a different context Kirsty Sherlock, Elizabeth A. Kirk and Alison D. Reeves "Just the Usual Suspects? Policy Networks and Environmental Regulation" 22 Environment and Planning C: Government and Policy 2004 pp.651-666.

[51] Convention on the Conservation of Migratory Species of Wild Animals 1979 1651 U.N.T.S. 333 (Bonn Convention).

[52] Barcelona Convention Rules of Procedure for Meetings and Conferences of the Contracting Parties to the Convention for the Protection of the Mediterranean Sea Against Pollution and its Related Protocols UNEP/WG.83/3 Annex II Rule 8.

[53] Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS), Monacco, 1996 (2001) 2183 U.N.T.S. 303.

of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS)[54] also introduce deadlines by which objections must be received.[55] This highlights a potential problem with the provisions under the Bonn Convention and the CBD – theoretically under the provisions found in these conventions the last objection necessary to prevent an organization obtaining observer status could be received at any time up until the start of the meeting. This potential threat, whether likely or not, creates uncertainty within the system of participatory rights as potentially does the lack of time limits on the application process under these conventions. ASCOBANS by contrast also has agreed time limits across the process for applying for observer status, from reception of the application to the last date on which objections may be received. Although none of these regimes contain ideal provisions in terms of encouraging participation, they do at least contain some form of criteria for the granting of observer status. A number of regimes, such as the Eastern Africa regional seas regime,[56] simply contain provisions requiring that the Executive Director, or Chair of the Conference of Parties or equivalent body, invite non-State actors or non-Party States to become observers to meetings.

These approaches to participation can be contrasted with the approaches seen in some of the non-binding mechanisms established to conserve marine bio-diversity. In these mechanisms non-State actors often play a significant role. For example some are involved in gathering data through tagging and monitoring various species so helping determine the success or otherwise of particular programmes and the need for new ones.[57] For example, the

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[54] Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS) 1992 (1994) 1772 U.N.T.S. 217
[55] Article III(4) of ACCOBAMS and Article 6.2.2 of ASCOBANS.
[56] Rules of Procedure for the Meetings and Conferences of the Contracting Parties to the Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region UNEP (DEPI)/EAF/CP.7/Inf2/en Rule 47.
[57] See generally <http://www.cms.int/en/about/partnerships> and <http://www.cms.int/en/projects>.

Memorandum of Understanding for the Conservation of Cetaceans and Their Habitats in the Pacific Islands Region which, when considering assessment of implementation of the Memorandum appears to place non-State actors on an equal footing with States by including them as full partners in the future monitoring of implementation of the MoU (paragraph 6). More significantly, the MoU was signed by States and non-State actors, as equal partners.

In addition to the restrictions discussed above, many of the regimes place stricter limitations on some non-State actors than on others depending on the type of right to be granted. Thus there are variations in the criteria applied as between those seeking observer and those seeking partner status and there are variations in relation to the types of non-State actors engaged with. In the Mediterranean, for example, International and regional NGOs are distinguished from national and local NGOs. In both cases, the NGOs must satisfy a long list of criteria contained in the annex which basically require the NGOs to have expertise relevant to the Barcelona Convention and to be operative within the relevant region and able to contribute to the regimes activities through participating in projects and distributing information etc. National NGOs must also be able to show a genuine interest in marine issues. Procedures are set out for approval of partnership status and accreditation is valid for 6 years. Similar criteria are laid down by a number of other regional seas regimes, including the Baltic,[58] and the North-East Atlantic.[59]

Despite some variations between and within regimes in respect of different types of participation, the criteria used in determining whether or not to grant

[58] Margi Prideaux, *The Natural Affiliation: Developing The Role Of NGOs in the CMS Family. Part One Summary of The Review: Defining the Relationship Between the NGO Community and CMS for the 40th Meeting of the CMS Standing Committee* (Wild Migration, Australia, 2013).
[59] Rules of Procedure of the OSPAR Commission (Reference Number: 2005-17) as revised at OSPAR 2001 (Annex 29), OSPAR 2002 (Annex 10), OSPAR 2005 (Annex 25). Editorial amendments made at OSPAR 2012 (see OSPAR 12/22/1, §§12.5-12.6)

observer, or partner status is relatively uniform across the regimes dealing with marine biodiversity. The focus tends to be on the existence of relevant expertise or proof of sufficient interest in the issue rather than on the ability of the non-State actors to enhance the legitimacy of the regime through broadening representation.[60] Although this accords with a widespread practice in marine resources regimes of limiting participation to those with a real interest in the issue being regulated - a practice that includes a limitation on State membership - and while arguably necessary to ensure that the convention regimes can operate effectively (and while recognised as a legitimate act under the Almaty Guidelines for that reason),[61] nevertheless this approach has the effect of excluding a large section of society from direct participation. It can also be contrasted with other areas of law where criteria range across such matters as: expertise, the nature of the organisation (for example, is the organisation a non-profit organisation), the character of the organisation (for example, NGOs may be scrutinised to establish whether or not they are truly non-governmental in nature), the international structure or scope of the organisation; its membership base; geographical coverage; aims and objectives; formal institutional structures; representative nature; and the length of time that it has been in existence.[62] It is not possible to determine at this time whether the focus of these criteria on expertise, and the relative uniformity of approach in marine biodiversity regimes, have arisen by design, or as a result of careful consideration of the needs of the regime, or are simply the outcome of chance or habit. It is, however, possible to conclude that this relative uniformity has the advantage of making the navigation of participatory rights somewhat easier for non-State actors. At the same time, however, it points to some potential concerns.

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[60] Anderson n.34.
[61] Almaty Guidelines paragraph 31.
[62] Ripinsky and Van Den Bossce n. 15, 217-218.

If the justification for ensuring participation by non-State actors is to improve decision-making by ensuring that a range of views and of types of information can be fed into the process, or to maintain the legitimacy of the decision-making process by ensuring that an appropriate cross-section of society is represented in the process, then these criteria fall short of what is required. If either of these scenarios applies then it may be appropriate to consider the true pedigree of certain non-State actors. For example, some NGOs, such as the Marine Stewardship Council, have been established as a partnership between environmental and industry groups. Other bodies present themselves as independent NGOs but are in fact wholly financed by industry. Should these bodies apply for observer status it may be appropriate to consider whose interests they represent. In such cases, the availability of clear criteria to assess the nature of the applicants would be useful in ensuring that their involvement is appropriate to the aims of the participatory processes concerned. Equally, a closeness between States and non-State actors may reduce the possibility of different perspectives being brought to bear on an issue and so reduce a regime's capacity for effective protection of biodiversity. Again, then, if the objective is to draw in a range of perspectives, clear criteria might need to be adopted to ensure the pedigree of the non-State actors joining the regime.

The discussion so far has revealed certain limitations upon participatory rights. What it does not tell us is the degree to which participation is limited to meetings or conferences of the parties and the degree to which, once granted, observer or partner status allows non-State actors or non-member States to attend and participate in other types of meetings. For example, many of the regimes reviewed here have provision for a scientific committee, but may not make explicit mention of the role of non-State actors in these committees. In addition, as Le Prestre notes (in relation to the CBD)

"[p]articipation need not be defined in the same way or take a similar form in every case."[63] The next sub-section considers the modes of participation granted to non-State actors.

Modes of participation

Under all of the agreements reviewed, non-State actors, when granted observer or partner status,[64] are described as being able to participate in meetings but not vote. In most they are entitled to make oral or written submissions to meetings and in some they may make proposals that will be voted on if supported by a State Party. For example, the Mediterranean has adopted a code of conduct for its "partner" NGOs, which addresses their rights and duties.[65] These provide that NGOs are to be afforded the opportunity to make oral or written contributions to meetings, that their comments are to be reflected in the report of the meeting and they have the right to information. It is expressly noted that they do not, however, have the right to vote.

These types of participatory provisions accord with the recommendations of the Almaty Guidelines on public participation in international fora.[66] Under some agreements, however, certain further limitations on participation apply. In the CBD actors granted observer status may participate in meetings only *if*

[63] Philippe G. Le Prestre, 'Studying the Effectiveness of the CBD' in Philippe G. Le Prestre (ed), *Governing Global Biodiversity: The Evolution and Implementation of the Convention on Biodiversity* (Ashgate 2002) Chapter 3 pp 57-90 at 83.
[64] While the term observer has a fairly uniform meaning across regimes there are some variations as to what is meant by partner. In some regimes partner organisations will have the right to attend all meetings, in other organisations their rights appear to be limited to what is necessary to enable participation in implementation projects.
[65] Barcelona Convention Decision IG.19/6 MAP/Civil Society Cooperation and Partnership.
[66] See paragraph 34 in particular.

invited by the President of the meeting to do so and so long as the Parties have not vetoed their participation. Under the CCAMLR observers may be present at both public and private meetings unless Members of the Commission request a restricted meeting in which case either only certain observers (which excludes civil society, NGOs *etc*.) may be present, or indeed no observers at all may be present.[67] In other words the participatory rights granted to non-State actors might be described as equating to consultation and the provision of information, which are rather low in the hierarchy of participatory rights discussed in the literature. Thus, the rights enable them to be informed and to provide information to underpin decisions, but does not guarantee that the information they provide will actually be taken into account in any decision-making. Indeed as Holder notes, a right to submit oral or written comments is not quite the same as a right to influence decisions[68] in so far as a right to submit comments does not guarantee that those comments will in any way influence the decision makers. One might not, therefore, put much store by the granting of these rights in terms of improving citizen participation. Indeed there are other provisions which, while not directly related to the granting of participatory rights, also have a potentially negative impact upon their exercise. For example, the CBD Rules provide in Rules 10 and 13 that meeting agendas need only be distributed to Parties. Moreover, the provisions in the CBD can be compared and contrasted with OSPAR's[69] provisions on the distribution of agendas. Rule 56 of OSPAR's Rules of Procedure provides that all documents and decisions are to be made available to anyone who requests them (on payment of a reasonable

[67] Commission for the Conservation of Antarctic Marine Living Resources Rules of Procedure, Basic Documents December 2012 Rule 33.
[68] Jane Holder, *Environmental Assessment: The Regulation of Decision Making* (Oxford University Press 2004) chapter 8, 205.
[69] Convention for the protection of the marine environment of the North-East Atlantic 1992 (2006) 2354 UNTS 67

fee if appropriate) unless there is a reason as set out in Rule 57 (e.g. commercial confidentiality) that has led to a request that the documents not be released. Seen in this context the CBD provisions appear particularly restrictive and not designed to induce effective public participation. That said, the OSPAR regime does also differentiate between actors in the provision of access to documents. Parties, observer States and observer international organisations automatically have access to all documents, under Rule 58. By contrast NGOs have automatic rights only to some documents and may have to request other documents under Rule 56 and pay a fee to obtain them.

Further distinctions are applied in other regimes. In CITES the Rules of Procedure provide that during plenary sessions and in committees and working groups observers are to sit in specially designated seating areas and may only enter the delegates area if invited by a delegate to do so (Rule 11) and that the media are to be similarly segregated (Rule 13.) While observers and the media may variously be invited or permitted to enter other areas, this segregation points to the limitation of rights and opportunities for non-State actors to engage with States during the decision-making processes.[70] The Mediterranean code of conduct referred to earlier also provides an example of differentiation in the level of participation afforded to different types of non-State actors. A distinction is drawn between international and regional NGOs on the one hand and national and local NGOs. The former are automatically entitled to participate in meetings, the latter must request special permission to attend a meeting or conference of direct concern to them and such requests are described as "exceptional".

Similar distinctions between different types of non-State actors are drawn in other regimes. For example, the Wider Caribbean Region draws a distinction

[70] Though it might be argued that much of the important decision-making takes place outside of the plenary hall.

between, on the one hand, Non-Party States and the UN and its subsidiary bodies, all of which are automatically entitled to attend meetings once granted observer status,[71] and, on the other hand, NGOs and other IGOs which are, under Rule 54, allowed to participate "in matters of direct concern to them". OSPAR contains similar provisions and also distinguishes between general and specialist observers, limiting the number of seats available at meetings for specialist observers (i.e. those NGOs dealing with a very specific area of OSPAR's work and which will likely have an interest in attending only a particular meeting or part of a meeting.)[72] The Black Sea regime places more extreme limitations on the numbers of observers or representatives of observers that may attend meetings. Here NGOs are entitled to attend a forum from which they may elect two representatives to attend meetings of the Commission.[73] This type of arrangement is found in other international organisations where, as Ronit and Schneider note, the organisations often go further in recognizing "only one organization for each interest category".[74] By contrast, although the IWC also limits the number of seats available to observers, in that case the limitation applies per observer, not to the number of observer organisations.

The drawing of distinctions between different groups of observers or partners is found in areas beyond the conservation of marine biodiversity. Kamminga,

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[71] Rules of Procedure of the Caribbean Environment Programme, Report of the Fourteenth Intergovernmental Meeting on the Action Plan for the Caribbean Environment Programme and Eleventh Meeting of the Contracting Parties to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, October 2010, UNEP (DEPI)/CAR IG.30/6 Annex VIII Rules 52 and 53. See also Rules of Procedure of the Commission on the Protection of the Black Sea Against Pollution <http://www.blacksea-commission.org/_od-commission-rulesofproc.asp>.

[72] OSPAR, Rules of Procedure of the OSPAR Commission (Reference Number: 2005-17).

[73] Rules of Procedure of the Commission on the Protection of the Black Sea Against Pollution, Rule 1(6).

[74] Karsten Ronit and Volker Schneider, 'Private Organisations and Their Contribution to Problem-Solving in the Global Arena' in Karsten Ronit and Volker Schneider (eds), *Private Organisations in Global Politics* (Routledge 2000) 15.

for example, discusses it in relation to NGO activities in the UN and other bodies.[75] But there are apparent differences in the nature of rights granted in marine biodiversity regimes and participatory rights under some other regimes. Whereas, as noted earlier, participatory rights in the marine biodiversity regimes are largely limited to rights to receive or provide information, in some other areas such as global health, education and agriculture non-State actors, and NGOs in particular, are engaged in full decision-making.[76]

Any criticism of the marine biodiversity regimes should, however, be tempered by the fact that an examination of the rules of procedure (or their equivalent) does not tell the full story on participation any more than an examination of treaty provisions alone would. Parties to the various agreements have repeatedly recognised the importance of participation by different sectors of society in the decisions they adopt. For example, in their calls for participation by stakeholders and civil society generally, the Parties to the CBD have recognised that the varying interests of stakeholders and others require the Parties to engage with them in different ways. Thus, they have over time adopted decisions relating to the provision of information to the public,[77] called upon business to be engaged in the process of implementation of the Convention and its Strategic Plan,[78] and agreed to work on capacity building for indigenous peoples including through the provision of a knowledge sharing web page.[79] All of these actions point to, at

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[75] Menno T. Kamminga, 'What Makes an NGO 'Legitimate' in the Eyes of States?' in Anton Vedder (ed), *NGO Involvement in International Governance and Policy*, vol Nijhoff Law Specials 72 (Brill Academic Publishers 2007) 175 .
[76] David Gartner, 'Beyond the Monopoly of States' (2010-2011) 32 University of Pennsylvania Journal of International Law 595, 621.
[77] See, for example COP 9 Decision IX/32 Communication, education and public awareness (CEPA); MOP 2 Decision BS-II/13 Public awareness and participation; MOP 4 Decision BS-IV/17 Public awareness, education and participation.
[78] See, for example, COP 10 Decision X/2; Decision XI/7 Business and biodiversity.
[79] See, for example, Cop 10 Decision X/40 Mechanisms to promote the effective participation of indigenous and local communities in the work of the Convention.

least, a desire on the part of the Member States for greater participation by non-State actors in the implementation processes. This desire is mirrored in calls for greater participation of non-State actors in the CBD's implementation process. An illustration of this can be found in the recommendations of the Working Group on the Review of Implementation (WGRI). This Group has made a number of calls that appear designed to increase the involvement of certain groups of non-State actors in the implementation of the Convention. Recommendation 1/5,[80] for example, calls for consideration to be given to involving indigenous and local communities in the plan of implementation and notes the need for the plan to address "[t]he full range of potential audiences, including key stakeholders, the general public and donors". This suggests that the members of the WGRI were aware that the participation of non-State actors has been too limited. Similarly ASCOBANS has recognized the importance of providing information to the public to help them to become involved in monitoring programmes.[81]

The provision of participatory rights through decisions or recommendations points to the possibility that Parties to regimes addressing marine biodiversity are growing increasingly aware of the benefits that participatory decision-making can bring. It is, however, also potentially problematic in that these provisions are easily revised. Whilst this may bring the advantage that States can refine the participatory rights as practice points to issues arising with them, it also means that such rights can be withdrawn more easily than were they enshrined in a treaty document. It means also that the only conclusion that can be drawn at this point in time, is that participatory rights tend to be afforded at the lower level of Arnstein's ladder of participation, though there may be a move towards granting greater rights.

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[80] WGRI 1 Recommendation 1/5 Mechanisms for Implementation: Review of the Global Initiative on Communication, Education and Public Awareness.
[81] See ASCOBANS Annex para. 5.

A Taxonomy of Participatory Rights in Biodiversity Regimes

As indicated earlier in the paper, the rights granted in relation to decision-making in binding regimes tend to be rights of access to information or to provide information. In some non-binding regimes, such as the Coral Triangle Initiative, non-State actors are accorded rights to partnership, or co-decision-making powers. This categorisation of rights can be refined further by consideration of the limitations placed on the exercise of participatory rights by non-State actors. With some regimes operating more restrictive regimes for the granting of rights than others. Figure 1 illustrates the categories of rights that exist.

<Figure 1 here>

The fullest rights are those towards the top and left of the table, with the most restrictive towards the bottom and right. It is possible at this stage to note that Parties appear to be reluctant to grant full partnership rights in relation to binding decision-making processes. Such rights tend only to be granted in relation to soft-law arrangements or in the implementation of binding agreements. Instead the rights in binding decision-making processes tend to be quite restricted, with limited rights to receive or present information being given in many instances, and in some only limited rights to be present granted to (certain) non-State actors. This distinction throws up an interesting geographical distinction too. Amongst the regional seas regimes it is also possible to distinguish between those providing greater or lesser participatory rights on a geographical basis. The soft law regimes placing stronger reliance

on the roles of non-State actors both in terms of partnership agreements and cooperation generally and in terms of funding, tend to be situated in Africa and Asia. This focus on non-State actors may not be surprising when one considers that these regions are more likely to need assistance in providing the capacity to implement the regime, than is, for example, Europe, but it does raise the question of whether or not such partnerships are beneficial and, if they are, why regimes in other parts of the world are less willing to engage with non-State actors.

Implementation procedures are more likely than decision-making procedures to involve those rights towards the top and left of the figure. Of course regimes and their rules are developed through implementation. Implementation actions show how decisions are interpreted and action that is deemed to be non-compliant may prompt development of new provisions, or revision of existing ones.[82] In so far as such development may happen, the distinction between direct engagement in the generation of new rules and amendment of existing ones on the one hand and engagement through the implementation processes on the other, may seem rather artificial and perhaps a little dated. Though it accords with the tradition in international law of recognising only States as having authority to make international law, it ignores the reality of the influence that non-State actors wield in the development of the law of the sea.[83]

Reviewing the provisions on the granting of observer or partner status throws up an additional categorisation issue. While in some regimes the provisions on the granting of observer (or other status) are found in treaty texts, none of the regional seas treaties contain such provisions. Instead the granting of

[82] Elizabeth A. Kirk "Non-Compliance and the Development of Regimes Addressing Marine Pollution from Land-based Activities" (2008) 39 (3) Ocean Development and International Law, pp. 1-22.
[83] Kirk n. 11.

observer status is addressed, if at all, in rules of procedure. While the net effect in the different regimes might very well be the same in practice – observer status is granted to non-State actors – the fact that some regimes address the question of such status in treaties, whilst others address it in soft law rules of procedure points to better protection of observer status in the former than in the latter. It is, after all, much easier to amend rules of procedure than it is to amend a treaty, not only procedurally but also in that there tends to be less scrutiny by the media and the public of amendments to what may be termed regulatory instruments than of legislative instruments such as treaties. These distinctions are, as noted earlier, magnified where the rights to participate are contained in decisions or recommendations of the regimes. Thus we can add additional categories to our types of participatory rights – permanent and fixed v. reversible and malleable. Given that in the majority of regimes, participatory processes appear to be designed to meet similar objectives, the fact that different categories of rights are granted may be presumed to impact on the legitimacy of regimes in different ways. The next section examines these issues.

Participatory Rights and Legitimacy

In general, the degree of participation afforded to non-State actors in the marine biodiversity regimes could be described as fitting with the objectives of the regimes in respect of participatory processes in that improving the flow of information between States and non-State actors should improve implementation of the regimes. Equally, however, none of the organisations discussed here could be described as providing cutting edge participatory rights. While some organisations do provide for partnership status, those that do tend to be soft law organisations, or to provide for partnership status in implementation. They could not then be described as being of an equivalent

status to, for example, the rights provided by the parties to the Aarhus Convention where NGO representatives sit as members of compliance committees[84] holding States to account for breach of binding obligations. This may not be terribly surprising given that, in the context of marine biodiversity the reason for engaging non-State actors appears to be to enhance the capacity to take better quality decisions and ensure more effective implementation of agreed provisions, rather than to improve the democratic legitimacy of the regime. Yet the review of the levels of participation granted suggests that the rights may not be sufficient to ensure better quality outputs. The lack of guaranteed access to information, combined with the lack of guaranteed opportunity to present information to decision-makers in almost all contexts, are significant stumbling blocks to improved decision-making. The provisions on participation generally make no mention of a requirement to inform non-State actors of their rights, let alone of an obligation to seek out non-State actors to admit to the decision-making procedures. This approach to participation means that States remain in control of decision-making. If a regime's legitimacy is assumed to be dependent upon the use of participatory decision-making, the fact that States remain in control is unlikely to be perceived as improving the legitimacy of the regime.[85] In addition, the restriction of participation to organised interests only may undermine the overall legitimacy of the regimes. First it may reduce non-State actors confidence in the regimes and willingness to participate in them. Whether a reduction in confidence and willingness to engage arises or not, the restrictions on participation by non-State actors may mean that the regime outputs are weaker than could be hoped for as they may rest on a less than

[84] First Meeting of the Parties to the Aarhus Convention, Decision 1/7, UN Doc. ECE/MP.PP/21Add.8, annex, para. 4 (2004).
[85] Monika Suškevičs "Legitimacy Analysis of Multi-Level Governance of Biodiversity: Evidence from 11 Case Studies Across the EU" (2012) 22 Environmental Policy and Governance 217-237. See also Charnovitz n.4.

ideal range of information. Deliberation may also be diminished if there is no opportunity, or only a limited opportunity to take account of alternative views.[86]

These conclusions then point to two areas for further research: establishing the nature of the outputs of decision-making in the marine biodiversity regimes and establishing the impact on the willingness of States and non-State actors to become or remain actively involved in the regime. At this point in time we might hypothesise that certain types of rights will lead to better quality of decisions and to improved legitimacy as a result. Those offering the fullest participatory rights (as illustrated in figure 1) appear more likely to achieve this than those offering only limited rights to a select group of observers.

The findings with regard to levels of participation point to a second legitimacy issue. Whether differentiation between different groups of non-State actors in terms of the level of participatory rights, or the ease with which they may be exercised, is appropriate to ensuring legitimacy or otherwise achieving the aims of the regimes is again debatable. While it is recognised that some limitation on the numbers of bodies participating may be necessary, the blanket criteria that are applied may not lead to the best possible outcomes. It creates a hierarchy amongst non-State actors and may lead some actors to see the privileging of rights of others as reducing the legitimacy of the regime. Where that happens it may make successful implementation of the regime more difficult. Even without a reduction in perceived legitimacy the creation of a hierarchy of rights may diminish opportunities for implementation. If, for example, there is a question regarding protection of biodiversity in the coastal zone it is possible that local community groups

[86] Daniel C. Esty, "Good Governance at the Supranational Scale: Globalizing Administrative Law" (2006) 115 YALE L.J 1490.

may be best placed to provide information on the uses made of particular areas by them. Yet, some of the regional seas agreements make it very difficult for such groups to participate in decision-making and instead give preference to international groups, or to specialist non-State actors. The drawing of such distinctions is not, however, unique to marine biodiversity. Kamminga, for example, discusses it in relation to NGO activities in the UN and other bodies.[87] ECOSOC, for example, distinguishes between the observer rights of non-Party States and the consultative rights of non-State actors. The latter are further split into general, special and roster status, with different criteria applied to the granting of each status.[88] Again, though this potential issue with legitimacy in marine biodiversity regimes points to an area in which further research should be undertaken.

In addition, the fact that the rights to participation are generally contained in rules of procedure and in decisions and recommendations means that such rights may easily be revised or removed. The potential uncertainty created by the nature of the provisions could again be felt to undermine the legitimacy of the regimes in the eyes of non-State actors. It does, as noted earlier, also provide greater opportunity for revision and improvement of such rights compared to enshrining them in treaty. This then points to a further issue for future research: it might be fruitful to establish both the nature and degree of change in participatory rights within marine biodiversity regimes, and the impact of any such change on the regimes' perceived legitimacy.

Conclusions and Recommendations for Further Research

[87] Kamminga n.75.
[88] ECOSOC Res. 1996/31, 49th Plenary Meeting 1996 "Consultative Relationship Between the United Nations and Non-Governmental Organizations"

This chapter has mapped out the types of participatory rights granted in regimes addressing marine biodiversity. The broad conclusion to draw from this mapping process is that guaranteed rights for participation by non-State actors are rather limited, though their rights to participate in soft law regimes or through soft law provisions attached to binding regimes are rather fuller. In addition, it appears that certain groups tend to be privileged in the granting of participatory rights, in that international NGOs have greater rights than national or local and that indigenous or local communities are more likely to be referred to than the business community in the documents providing for participatory processes. In many respects the rights provided for non-State actors in the regimes discussed here are similar to rights in other areas of international law, though they do not accord with best practice. The mapping exercise is, however, just the beginning of the necessary research. The next stage is to establish how closely practice mirrors the provisions discussed in this chapter. Do, for example, Parties to regimes strictly apply the threshold criteria contained in rules of procedure? Have they interpreted these criteria in set ways? And in this context, the impact that threshold criteria have on the willingness or desire of non-State actors to engage with regimes is also critical. It may be that other factors play a more significant role in influencing how non-State actors engage with regimes. For example, some NGOs have indicated that they prioritised working with certain international organisations (such as the climate change regime and CITES) over others (such as the Bonn Convention) as they saw more chances of their work having a positive impact.[89]

The discussion has also shown a variety of routes being adopted to ensure flexibility in the criteria for the granting of observer or partner status. In

[89] Prideaux n.58 at 5.

common with other areas of international law,[90] criteria tend to be contained in rules of procedure. The advantage of this practice is that these are flexible documents, which may be amended more readily than treaties. It also makes it possible to adopt different rules for different aspects of the work of the organisation. Some of the organisations provide for even greater flexibility by giving discretion to the Executive Director or Chair to invite entities to become observers. The question that then arises is which of these routes provides for the more objective approach to the granting of observer status i.e., which is the least subject to political influence. Kamminga suggests that the granting of observer status by the Secretariat alone, without the need for State approval[91] has proved more objective in practice in other areas of law. Whether or not marine biodiversity follows these areas is a possible topic for further research. In addition, in the many marine biodiversity regimes where little guidance is given as to the criteria to apply when considering the granting of observer or partner status, it would be useful to establish whether or not criteria have been developed in practice. It would also be useful to establish whether or not any such criteria, or the lack of such criteria, impact upon the perceived legitimacy of the regimes.

A further set of research questions centre on the impact of participation on the regime. Broadly these questions are: what impact do the different forms of participatory rights outlined here have on the legitimacy or effectiveness of the regimes; has participation influenced the type of decisions made within the regime, or influenced the ways in which the regime has been implemented?

Finally, there is further work to be done in establishing the impact of the various participatory processes on the legitimacy of the regimes. In addition

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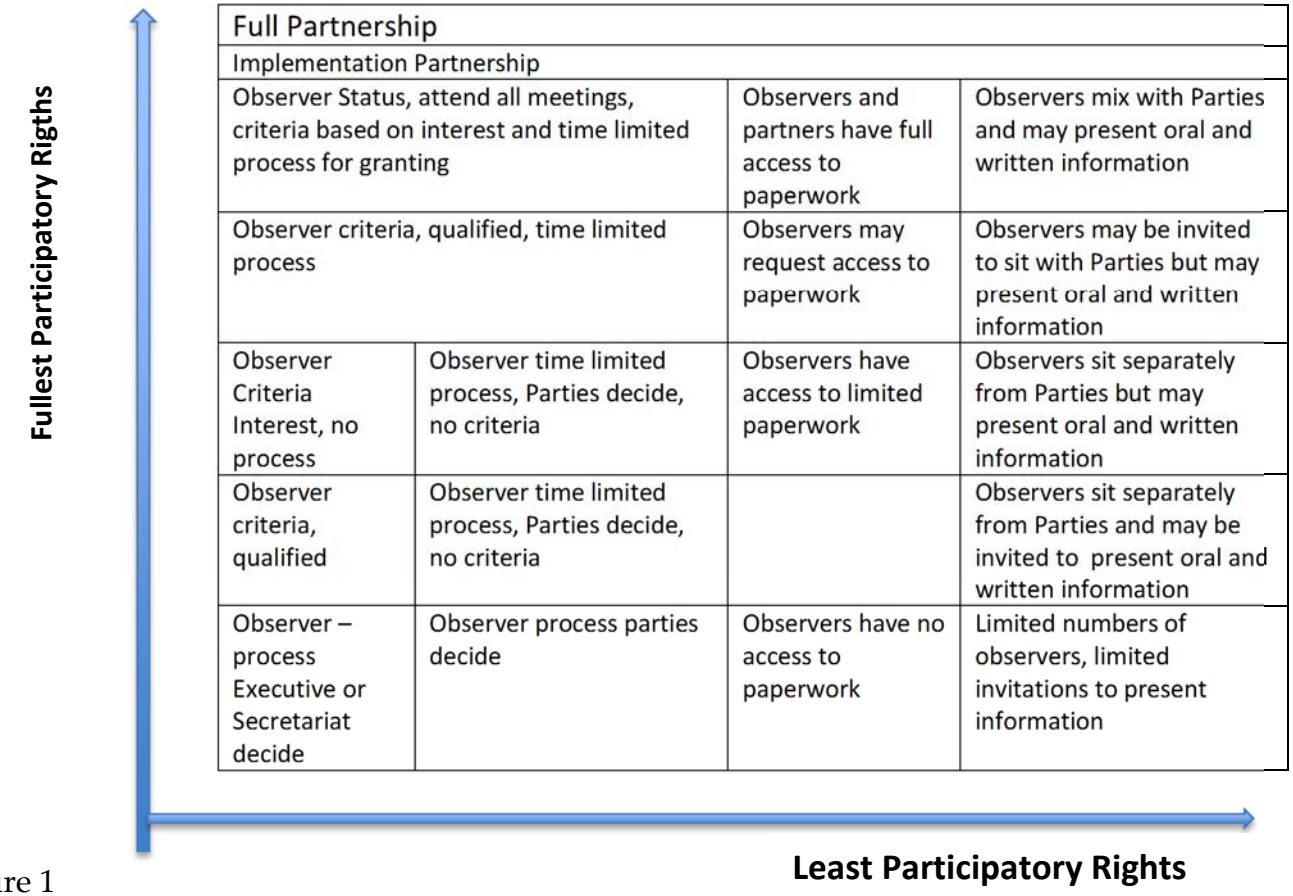
[90] *Ibid*, 209.
[91] Kamminga n.75.

to the question of whether in fact the decision-making outputs are of a better quality as a result of participatory processes, further research is needed to establish whether or not this improves the legitimacy of the regime. In addition it might be fruitful to consider the comparative impact of participatory processes and lobbying on the impact of the perceived legitimacy or effectiveness of marine biodiversity regimes.



Full Partnership			
Implementation Partnership			
Observer Status, attend all meetings, criteria based on interest and time limited process for granting		Observers and partners have full access to paperwork	Observers mix with Parties and may present oral and written information
Observer criteria, qualified, time limited process		Observers may request access to paperwork	Observers may be invited to sit with Parties but may present oral and written information
Observer Criteria Interest, no process	Observer time limited process, Parties decide, no criteria	Observers have access to limited paperwork	Observers sit separately from Parties but may present oral and written information
Observer criteria, qualified	Observer time limited process, Parties decide, no criteria		Observers sit separately from Parties and may be invited to present oral and written information
Observer – process Executive or Secretariat decide	Observer process parties decide	Observers have no access to paperwork	Limited numbers of observers, limited invitations to present information

Figure 1

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